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23 September 1999

Rick Breitenbach
CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
Sacramento, CA 95814
via facsimile and mail

Re: Comments of Planning and Conservation League addressing use of the Monterey Agreement in the CALFED Programmatic EIS/EIR

Dear Mr. Breitenbach:

The Planning and Conservation League (PCL) is one of three appellants and cross-respondents represented by the undersigned counsel in *Planning and Conservation League, et al. v. Department of Water Resources, et al.*, 3 Civil C024576, an appeal pending before the Third District Court of Appeal in Sacramento. The underlying action challenges the adequacy under the California Environmental Quality Act (CEQA) of the Program Environmental Impact Report supporting the Monterey Agreement, as well as the validity of amendments to State Water Project contracts grounded in that agreement. PCL submits these comments to underscore the reliance of the CALFED Draft Programmatic EIS/EIR upon the Monterey Agreement and the CALFED draft's failure to fully inform decision-makers and the public of the implications of that reliance.

The Monterey Agreement EIR

The December 1994 Monterey Agreement, which emerged from secret negotiations between the California Department of Water Resources (DWR) and a handful of selected major state water contractors, formed the basis for the most substantial statewide contractual restructuring in the four-decade history of the State Water Project. Remarkably, rather than serving as lead agency for the program EIR framing this effort, DWR delegated that task to the Central Coast Water Authority (CCWA), a regional joint powers agency whose limited duties are confined to Santa Barbara County.

The cursory EIR prepared by CCWA reflects its paucity of expertise and authority over any statewide matters affecting the State Water Project. CCWA's EIR therefore evaded substantive analysis of key Monterey Agreement changes implemented in the water supply contract amendments. Foremost among these was the deletion of article 18(b) of the pre-Monterey water supply contracts. That provision, governing allocations in the event of a permanent water shortage, provided a mechanism without payment to contractors for proportional reductions in entitlements to bring them in line with existing supplies.

CCWA's report also obscured other major changes in the terms governing State Water Project contractors. These included the unrestricted fee simple transfer of the Kern Fan Element, a substantial public resource; the wholesale financial restructuring of the State Water Project in article 51 of the contract amendments; and the creation of a "two-tier" system of contractors, with a majority subject to the Monterey Amendments and a minority of non-signatories still subject to earlier provisions.

The Monterey Agreement Litigation

PCL's and other plaintiffs' CEQA challenge to the Monterey Agreement contends that CCWA improperly served as the lead agency in place of DWR and prepared an invalid EIR. They also challenge the validity of the Monterey Amendments, which require the illegal divestment of a public resource (the Kern Fan Element) in violation of Water Code section 11464. In a 1996 ruling, Judge Cecily Bond of the Sacramento County Superior Court concurred with plaintiffs that DWR's assignment of lead agency duties to CCWA violated CEQA, but declined to find prejudice in that assignment. Judge Bond also entered judgment for defendants on plaintiffs' validation challenge to the Monterey Amendments on the theory that indispensable parties were not present.

Plaintiffs' appeal pending in the Third District contends that the assignment of lead agency duties to CCWA was not only unlawful, but also prejudicial. The appeal contends that CCWA's EIR violated CEQA in numerous respects, and that plaintiffs named all indispensable parties needed to secure a validation judgment. DWR's cross-appeal contends that it was not required to serve as lead agency, and CCWA could do so. CCWA itself is not a party to the cross-appeal.

Briefing on the appeal has been complete for more than a year, and the parties are awaiting a hearing date. Plaintiffs' attached letter to the Third District Court of Appeal, sent concurrently with this letter, reiterates their earlier request to have this matter heard on the Court's first available calendar date pursuant to Public Resources Code section 21167.6(i).

The Monterey Agreement and CALFED

The Monterey Agreement is expressly assumed to be part of the "No Action Alternative" as defined in that CALFED Draft EIS/EIR. Section A.2.1 of the CALFED Draft EIS/EIR identifies the "Monterey Agreement" as among the physical features included in the No Action Alternative. To satisfy the standards for inclusion in that section, the Draft EIS/EIR necessarily relies upon the preparation of final environmental documents and issuance of environmental permits to implement the Monterey Agreement, as well as concluding that its effects were identifiable at the level of detail

being considered for program analysis. (CALFED Draft EIS/EIR, p. A-2.) DWR Bulletin 160-98, relied upon in CALFED's report, also assumes implementation of the Monterey Agreement. (See pp. 2-7, 2-8.)

These conclusions relating to the Monterey Agreement are of critical importance to the analysis in the CALFED Draft EIS/EIR, since the No Action Alternative with the defining features noted above was also "used as a basis for comparison of the Program alternatives." (CALFED Draft EIS/EIR, p. 2-19.) Likewise, none of the program alternatives alter the assumption that the Monterey Agreement shall apply. However, the pending Monterey Agreement litigation before the Court of Appeal challenges each of the assumptions that underlie the inclusion of the Monterey Agreement as a defining part of the No Action Alternative. That case challenges the adequacy of the EIR addressing implementation of the Monterey Agreement, the legal adequacy of final agency approvals based upon the Monterey Agreement, and the sufficiency of the detail in the EIR for purposes of program analysis.

The CALFED Draft EIS/EIR's failure to disclose that the Monterey Agreement and its EIR remain the subjects of pending litigation deprives decision-makers and the public of significant information relating to a substantial risk of upset. PCL does not question the lead agency's prerogative to accept the Monterey Agreement EIR as valid in the absence of an injunction or similar relief. (Pub. Res. Code, §21167.3(b).) However, the corollary to that principle is that approval decisions relying on it are at the "*applicant's risk* pending final determination" of the Monterey Agreement litigation. (*Ibid.* (emphasis added).) Should the present litigation ultimately result in the invalidation of the Monterey Agreement EIR or the amendments grounded in that agreement, any decisions within the CALFED process relying on those sources would also face invalidation.

As part of its analysis of the no project alternative, the lead agency must project "what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." (14 Cal. Code Regs., §15126.6(e)(2).) The CALFED EIS/EIR must therefore be revised to analyze the reasonably foreseeable prospect that judicial resolution of the Monterey Agreement litigation will result in invalidation of CCWA's EIR, the contract amendments based upon that agreement, or both. In addition, DWR simulations used as modeling tools in Attachment A to the CALFED EIS/EIR should evaluate the consequences of applying pre-Monterey provisions in State Water Project contracts, including the enforcement of article 18(b)'s "permanent shortage" provision—which indeed remains effective for those contractors who have *not* signed Monterey amendments.

The CALFED EIS/EIR's reliance on the Monterey Agreement as a core assumption of the No Action and program alternatives creates problems that will require substantive revisions even if the Monterey EIR and contract amendments ultimately survive judicial challenge. As an illustration, the CALFED EIS/EIR identifies "water use efficiency" as a program goal, and states that it is designed to encourage water conservation and recycling, with the aim of assuring "efficient use of existing and any new water supplies" developed by the program. (CALFED Draft EIS/EIR, p. 2-10; see also Draft Water Use Efficiency Program Plan, p. 1-1.) But notwithstanding this goal, the EIS/EIR never links water efficiency or other locally developed water supplies south of the pumps to reduced pumping out of the Delta. On the contrary, it cautions against the conclusion that such

gains would translate into reduced Delta exports (*Id.* at p. 5.1-32.)

The Monterey Agreement provides the missing piece of this puzzle, since it relegates water pumped from the Bay-Delta but not consumed by South Coast users into a category of “surplus” water, substantially absorbed by Central Valley users. However, the CALFED Draft EIS/EIR fails to identify the Monterey Agreement as the basis for its statement that “the Water Use Efficiency Program would not necessarily equate to reduced water demand from a statewide perspective. Specifically, reduced demand would not be directly proportional to reduced Delta exports. Reduced water demand would simply increase available supply for consumption in another region of the state. This effect would be largely contingent upon the water-year type and delivery timing. For instance, if urban demand in the South Coast Region were reduced during a dry or critical water year, demands elsewhere in the state would be such that the foregone South Coast deliveries could be allocated to agriculture or urban consumption anywhere in the CVP and SWP service areas.” (CALFED Draft EIS/EIR, pp. 5.1-32, 33.)

This “missing piece” exemplifies the need for revised analysis in the CALFED EIS/EIR carefully tracing the role of the Monterey Agreement and resulting State Water Project contract amendments in the analysis of the No Action Alternative and program alternatives. Under the Draft EIS/EIR’s analysis of this issue, no mechanism appears to credit South Coast users for improvements in the reliability of the water supply to agriculture resulting from conservation and recycling programs. Likewise, no mechanism appears to allow South Coast efficiency improvements to inhere to the benefit of fish populations. Rather, real advances in conservation and efficiency are rendered virtually moot statewide due to their absorption elsewhere, as now facilitated by the Monterey Agreement. These consequences conflict with CALFED’s objective to reduce the conflict among beneficial water users. (CALFED Draft EIS/EIR, p. 1-7.)

Finally, the Draft EIS/EIR’s assumptions about contract deliveries under the State Water Project underscore the need for better analysis of the Monterey Agreement’s legacy. While the Draft EIS/EIR’s discussion of anticipated deliveries and long-term demand hardly stands as beacon of clarity, it appears to define water supply reliability in terms of the ability to meet full deliveries of contract water to State Water Project and Central Valley Project contractors. (See CALFED Draft EIS/EIR, pp. 5.1-25.) The modeling assumptions establish “bookends” between 1995 State Water Project demand and the DWR’s Bulletin 160-98 assumptions for 2020 demand. (*Id.*, pp. A-14 to A-20.) Notably, that same bulletin suggests that existing State Water Project facilities have a 65 percent chance of making full deliveries under 1995 level demands and less than a 25 percent chance of making full deliveries under 2020 level demand. (DWR, Bulletin 160-98, p. 3-33.)

Given those disparities, the CALFED EIS/EIR should not have omitted discussion of two key components of the Monterey Amendments bearing upon the State Water Project’s ability and need to make “full” deliveries to project contractors: deletion of contract article 18(b), which would have facilitated proportionate cuts in entitlements in response to permanent supply shortages; and addition of new contract article 51, whose “financial adjustments” provisions suggest an expectation that some new facilities earlier anticipated for the State Water Project will not actually be built. These provisions therefore directly affect the projected need under CALFED to satisfy a requirement of full deliveries to the State Water Project contractors.

Conclusion

In sum, the CALFED Draft EIS/EIR relies upon the Monterey Agreement in framing its definition of the No Action Alternative and assessing program alternatives, but fails to disclose that the validity of the EIR and contract amendments addressing the implementation of that agreement are the subjects of pending litigation in the Third District Court of Appeal. CALFED's assessment of the No Action Alternative and program alternatives must be revised to better account for the role of the Monterey Agreement, including the reasonably foreseeable prospect that the EIR and contract amendments rooted in that agreement may be judicially invalidated. Moreover, CALFED's failure to account for the Monterey Agreement will require substantive revisions in its EIS/EIR regardless of whether or not those judicial challenges ultimately succeed. Those revisions must include a more cohesive assessment of the Monterey Agreement's conflict with CALFED's water efficiency program objectives, and its effect on modeling assumptions affecting the anticipated percentage of deliveries to State Water Project contractors.

Respectfully submitted,



For Planning and Conservation League

Attachment: Letter of this date to the Court of Appeal in *Planning and Conservation League v. Department of Water Resources*, 3 Civil C024576

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23 September 1999

Presiding Justice and Associate Justices
Court of Appeal of the State of California
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

Re: *Planning and Conservation League v. Department of Water Resources*
3 Civil C024576

Honorable Justices:

This office represents plaintiffs, appellants and cross-respondents Planning and Conservation League, Plumas County Flood Control and Water Conservation District, and Citizens Planning Association of Santa Barbara County ("appellants") in the above-referenced appeal. Appellants wrote to the Clerk of the Court on 29 July 1998, notifying him of the completion of briefing in this action and requesting the first available calendar date for hearing pursuant to the California Environmental Quality Act (Public Resources Code section 21167.6(i).)

Since almost 14 months have now passed without any word from the Court on the scheduling of a hearing, appellants renew their request for a hearing on the first available date. Appellants' underlying action tests the legal adequacy of the EIR supporting the 1995 Monterey Agreement, and the validity of amendments to State Water Project contracts grounded in that agreement. Considerable public importance will attend the final resolution of the appeal and cross-appeal.

A subsequent development, however, even further supports resolution of this case as soon as practicable. The Draft Programmatic Environmental Impact Statement/ Environmental Impact Report for the CALFED Bay-Delta Program (CALFED EIS/EIR) was published in June 1999, with the period for written comment scheduled to close on 23 September 1999. The CALFED Bay-Delta Program, established in 1995, is a consortium of five state and ten federal agencies with management and regulatory responsibilities in the Bay-Delta estuary. The water supply for two-thirds of

California's population flows through that estuary, from which water is also pumped to more than 7 million acres of agricultural land. The Bay-Delta Program is intended to develop a long-term solution to fish and wildlife, water supply reliability, flood control, and water quality problems in the Bay Delta.

The Monterey Agreement at issue in this appeal figures centrally in the CALFED EIS/ EIR's identification of the No Action Alternative and assessment of program alternatives. Section A.2.1 of the CALFED EIS/ EIR identifies the "Monterey Agreement" as among the physical features included in the No Action Alternative. To satisfy the standards for inclusion in that section, the CALFED EIS/ EIR relies upon the preparation of final environmental documents and issuance of environmental permits to implement the Monterey Agreement, as well as concluding that its effects were identifiable at the level of detail being considered for program analysis. (CALFED EIS/ EIR, p. A-2.) These conclusions relating to the Monterey Agreement, *contested in the present appeal*, assume critical importance to the analysis in the CALFED EIS/ EIR, since the No Action Alternative with the defining features noted above "was used as a basis for comparison of the Program alternatives." (CALFED EIS/ EIR, p. 2-19.) Thus, the Court's determination of this appeal will likely govern the CALFED environmental assessment that is now underway.

Recognizing the significant context in which the present appeal embraces questions of CEQA compliance and relief, appellants have since their last communication to the Clerk engaged with respondents in settlement discussions. Appellants have nonetheless concluded that a voluntary resolution of this appeal seems most unlikely. Both sides require the Court's resolution of these important and challenging issues. Appellants therefore do not lightly submit this renewed request for prompt resolution, and do so only to ensure that the Court is aware of the expanding public interest in determination of the appeal and cross-appeal.

Respectfully submitted,



Attorney for Appellants and Cross-Respondents

PROOF OF SERVICE BY MAIL

I, Barya Billinkoff, hereby declare as follows:

I am a U.S. citizen; am over the age of 18 years and am not a party to the within action.

My business address is 380 Hayes Street, Suite One, San Francisco, California 94102.

On 23 September 1999 I served the **LETTER TO THE COURT DATED 23 SEPTEMBER 1999**

RE: RENEWING REQUEST FOR PROMPT HEARING by placing a true copy with postage

fully paid in the U.S. mail at San Francisco, California: to the persons listed below:

Marian Moe
Deputy Attorney General
1300 "I" Street
P. O. Box 944255
Sacramento, CA 94244-2550

Department of Water Resources

Susan F. Petrovich
Hatch & Parent
21 East Carrillo Street
Santa Barbara, CA 93101

Central Coast Water Authority

Thomas J. Graff, Senior Attorney
Environmental Defense Fund
Rockridge Market Hall
5655 College Avenue
Oakland, CA 94618

Amicus Curiae

I declare under penalty of perjury that the foregoing is true and correct and that this certificate of service was executed on 23 September 1999, at San Francisco, California.

By: Batya Billinkoff
Batya Billinkoff

September 30, 1999

Dear Colleague:

I am pleased to share with you a copy of Save The Bay's comments on the CALFED Bay-Delta Program Environmental Impact Statement.

We recognize the tremendous potential for the CALFED program to help restore ecological health to our watershed and to enhance California's environment and economy. That is why we, and our colleagues in the Environmental Water Caucus, have worked so diligently to make CALFED live up to its potential.

CALFED's latest draft plan does show progress, but it still short-changes the problems and restoration needs of San Francisco Bay itself, and proposes significant new surface storage without sufficient analysis to justify it economically or ecologically. The plan still needs a great deal of work, and the enclosed comments detail our recommendations for improvements.

I hope you will contact our Legal Director Cynthia Koehler or me if you have any questions or comments. Thank you for your interest.

Sincerely,

David Lewis
Executive Director

enclosure